THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
FOR THE FIFTH JUDICAL CIRCUIT

G. Thomas Cooper, Fifth Judicial Circuit Judge

Case No.: 96-CP-40-1230
Appellate Case No. 2013-001869

THOMAS J. AND CAROLYN SILVESTER . . . . . Appellants,

v.

SPRING VALLEY COUNTRY CLUB . . . . . .Respondent.

FINAL REPLY BRIEF OF APPELLANTS THOMAS J. AND CAROLYN SILVESTER

Thomas J. and Carolyn Silvester
12 Glenlake Road
Columbia, South Carolina 29202
803-736-0715

pro se

May 26, 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE FACTS

Ever since the Appellants filed their original Complaint against Spring Valley Country Club (SVCC). SVCC's attorneys have done everything in their power to keep this case from reaching trial. The original case was dismissed by the lower court and the Appellants appealed the dismissal. The Court of Appeals issued its Opinion No. 3297 reversing the Lower Court's Decision as to the continuing nuisance cause of action and remanded the Case back to The Richland County Court of Common Pleas. *Silvester vs Spring Valley Country Club, 344 S.C. 280, 542 S.E. 2d 563 (Ct/ App. 2001).* The Appellants gave the Court until early March, 2013 to set their case up for trial, at which time they called the court to ask why the trial date had not been set. At that time Judge Manning gave the Appellants and Respondents four months time to attempt to reach a resolution, or to set the case up for trial. The Respondents refused to try to resolve the case, and instead filed a Motion to Dismiss.

During the twelve years the lower court had to set this case up for trial the respondents never tried to settle the case even though the case had been remanded back to the lower court by The South Carolina Court of Appeals as to the continuing nuisance cause of action. *Silvester vs Spring Valley Country Club, 344 S.C. 280, 542 S.E. 2d 563 (Ct/ App. 2001).* They knew the charges were pending and the continuing nuisance damages which were abatable and were continuing.

The appellants realize that the narrow issue before the court is (1) What responsibility the lower court had to schedule a case remanded back to them by the South Carolina Court of Appeals and affirmed by the South Carolina Supreme Court, (2) Should the case be set up for trial.

ARGUMENT

I. The Trial Court Did Abuse Its Discretion In Dismissing This Action. Rule 41 (b) of The South Carolina Rules Of Civil Procedure Does not Apply To This Case. The Appellants Did Not Fail To Prosecute. They Were Never Given A Chance To Prosecute Because The Case Was Never Called To Trial.

Rule 41(b), SCRCP does not apply to this case because Rule 41(b), SCRCP does not address a case that was never scheduled for trial. All the cases cited by the Respondents, had been set for trial and the cases were dismissed because of failure of one of the parties to either show up for trial, or meet a requirement of the court timely. This was not the case with the appellants. They spent months appealing their case and met every requirement for a successful appeal. It was ironic that even after The South Carolina Court of Appeals remanded the case back to the court, the lower court, without ever even setting it up for trial, dismissed it. This was an abuse of discretion. Just as the appellant in *Sabrina McComas, v. Chris Ross, 368 S.C. 50, 626 S.E.2d 902 (Ct App. 2006)* the Appellants had put a lot of effort in their case with their appeal and their case should be remanded back to the court for the second time. Also under the facts of this case, dismissal was too harsh a sanction just as in *Sabrina McComas, v. Chris Ross, 368 S.C. 50, 626 S.E.2d 902 (Ct App. 2006)*

Even if Rule 41 (b) SCRCP did apply to this case, an appellate court should reverse the trial's court's decision because of an abuse of discretion and dismissal of case being too harsh a punishment.

II. The Trial Court did Err in Dismissing Appellants" Action for Failure to Prosecute

While the respondents statement that "Appellants' status as pro se litigants does not absolve them of the requirement to monitor and prosecute their case and to adhere to the Rules of Civil procedure," is accurate in cases that have been set for trial, but a case has to be set up for trial before it can be monitored or prosecuted. The respondents did not cite a Rule or case that said it was the responsibility of a pro se appellant to call the court and ask for their case to be scheduled for trial, especially one that had been remanded back by the South Carolina Court of Appeals, The Appellants assumed the court would obey the South Carolina Court of Appeals more so than obeying the appellants. Contrary to the respondents' accusations, the appellants complied with substantive and procedural requirements of the law as evidenced by their first appeal and the case being remanded back to the lower court.

"Abundant opportunity" was not given to the appellants to litigate. The case not being scheduled prolonged the case unnecessarily, not the appellants. All of the cases cited and Rule 41 (b) SCRCP were analyzed and interpreted incorrectly by the respondent and lower court..

In rebuttal to the respondent's statement," The *Shevey* Court also rejected the notion that the respondent-defendant was required to proactively demand a complaint from the appellant;" Don Shevey & Spires, Inc v. Am Motors Realty Corp. 279 S.C. 58, 301 S.E. 2d 757 (1983)

> "The defendants no less than the plaintiff, had the right. . . . to press for trial, but the *duty* to do so was the plaintiff's not theirs. While a defendant

may bring about an expeditious trial of a case, he has no legal obligation to do *so; except to meet such actions as are taken by the plaintiff, he may remain passive.*"

Ld. at 60, 301 S.E.2d at 759 (quoting Thomas & Howard Company v. Fowler, 238 S.C. 46, 52, 119 S.E. 2d 97, 100 (1961)

The defendant should not complain about any prejudice caused them because they had the right to press for trial and maybe should have. The respondents had this case pending against them, and they should have remained ready to defend themselves until case was cleared. They knew the case had not been set for trial. They knew every time it rained, they were creating a nuisance for the appellants. This is a situation where Rule 41 (b) of the South Carolina Rules of Civil Procedure does ***NOT*** address. The trial court abused its discretion and this case should not be dismissed but set for trial.

CONCLUSION

Appellants assert that the Court of Common Pleas misapplied Rule 41 (b) of the South Carolina Rules of Procedure, and the cases cited in the Respondents Initial Brief and in the Order to Dismiss are not applicable in the way the respondents applied them to the present case.

Opinion No. 3297 by the South Carolina Court of Appeals and affirmed by The South Carolina Supreme Court should be honored. The Order to Dismiss by the circuit court on August 5, 2013 should be remanded. The Appellants met all the requirements for the prosecution of this case and waited patiently for the Richland County Court to fulfill their responsibilities of bringing this case to trial. The dismissal of this action was not warranted and is a clear abuse of discretion and is a harsh sanction, considering the amount of time and effort expended by the appellants trying to get this case prosecuted. Based on the aforementioned, appellants respectfully request that the judgment of the lower court should be reversed and this case set up for trial as The South Carolina Court of Appeals ordered and The South Carolina Supreme Court affirmed.

Respectfully submitted,

THOMAS J. SILVESTER
Thomas J. Silvester

Carolyn B. Silvester
Carolyn B. Silvester
Thomas J. and Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715

pro se

Columbia, SC
May 26, 2014

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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief, Final Reply Brief and Certificate of Counsel on John E. Cuttino, Esquire, attorney for Respondent on this 26th day of May, 2014 by depositing a copy of it in the United States Mail, postage prepaid addressed to the following:

John E. Cuttino
GALLIVAN, WHITE & BOYD
1201 Main Street, Suite 1200
Columbia, South Carolina 29201

Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 20223
803-736-0715
Appellant Pro Se

May 26, 2014

CERTIFICATE OF COUNSEL IN FINAL REPLY BRIEF

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 210(b), and SCACR

Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715
Appellant Pro Se

May 26, 2014

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Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715
Appellant Pro Se

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John E. Cuttino
GALLIVAN, WHITE & BOYD
1201 Main Street, Suite 1200
Columbia, South Carolina 29201

Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29206
803-736-0715
Appellant Pro Se

May 26, 2014